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CIRCUIT COURT OF NORFOLK COUNTY.

PORT NORFOLK LAND CO. v. PORTSMOUTH STREET RAILWAY CO.

September 11, 1899.

1. **STREETS**—*Dedication on sub-division of land by owner under statute—County roads.* While streets, outside of an incorporated city or town, dedicated under the act "providing for the sub-division of tracts of land into lots or parcels, and for the record of plats thereof" (Acts 1887-8, p. 553; Amended Acts 1889-90, p. 35), thereby become public highways, without any acceptance by the public, they do not become county roads until accepted or established as such by the county court.
2. **STREET RAILROAD**—*Streets—Construction of charter.* A street railroad company has no right to occupy such streets with its tracks solely by virtue of authority in its charter thus to occupy county roads, subject to such conditions, limitations and restrictions as may be imposed by the county court of the county whose road is used.
3. **STREETS**—*Railroads—Additional servitude.* While a local street railroad in such streets is not an additional servitude, a railway through such streets, extending from a neighboring city to a town more than twenty miles distant, passing through three counties, having the right to transport freight, passengers and baggage, must be classed as a commercial railroad, and is an additional servitude on such streets, for which the owner of the fee is entitled to compensation.

H. H. Rumble, Tunstall & Thom, and Wool & White, for the complainant.

Watts & Hatton, Wm. Hodges Mann, and F. M. Leonard, for the defendant.

PRENTIS, Judge:

The object of this suit is to enjoin the Portsmouth Street Railway Company from using Broad Street and Bay View Boulevard, in Port Norfolk, for its tracks. It appears that these streets are in Norfolk county, and were dedicated by the Port Norfolk Land Company under the act entitled "An act providing for the sub-division of tracts of land into lots or parcels, and for the record of plats thereof." (Acts 1887-8, p. 553.) The first and third sections of the said act, the third of which has been amended (Acts 1889-90, p. 35), read as follows:

"1. *Be it enacted by the General Assembly of Virginia,* That hereafter every owner or proprietor of any tract of land who has heretofore sub-divided, or shall hereafter sub-divide, the same into three or more parts for the purpose of laying

out any town or city, or any addition thereto, or any part thereof, or suburban lots, shall cause a plat of such sub-division, with references to known or permanent monuments to be made, which shall accurately describe all the sub-divisions of such tracts or parcels of land, and giving the dimensions and length and breadth thereof, and the breadth and courses of all the streets and alleys established therein. Descriptions of lots or parcels of land in such sub-divisions, according to the number and designation thereof on said plat contained, in conveyances or for the purpose of taxation, and copies of such plats, or extracts therefrom, properly attested by the clerk in whose office said plats are recorded, shall have the same force and effect as evidence that copies of deeds now have, shall be deemed good and valid for all intents and purposes."

"3. The acknowledgment and recording of such plat shall operate to create a public easement or right of passage over such portion of the premises platted as is on such plat set apart for streets or other public use, and shall be equivalent to a deed in fee simple to such portions thereof as is therein dedicated to charitable, religious or educational purposes: *Provided*, that nothing herein contained shall prevent the persons who set apart such lands for streets and alleys, their heirs and assigns, where otherwise they have the right and power to erect, put down and maintain gas, water and electric works, pipes, wires and fixtures, to erect, put down and maintain the same along or under the portions so set apart: *Provided*, however, that they shall not obstruct or hinder passage over such streets or alleys further than is reasonably necessary while laying down, erecting or repairing such works, pipes, wires and fixtures."

By the second and third sections of its charter the Portsmouth Street Railway Company has, in addition to its rights in the city of Portsmouth, the right to—

"locate, construct, equip, maintain and operate along and through . . . the county roads of the counties of Norfolk, Nansemond and Isle of Wight, or along and through such other lands (not exceeding eighty feet in width) as it may acquire, a branch of its said railway, by such route as its board of directors may determine, from Portsmouth to Smithfield, and any extensions and subordinate branches of the said railway and the said Smithfield branch, within the said city and the said counties, or any of them: *Provided*, that . . . the use of the county roads of any of the said counties shall be subject to such conditions, limitations and restrictions as may be imposed by the county court of the county whose road is used; and *provided further*, that nothing herein contained shall affect in any way the right of individuals and corporations who are owners of lands abutting on said county roads, to have just compensation from the said company for such of their property as may be taken by the construction of the company's lines along and through the said roads. . . . And if the said company and the said owners cannot agree on the terms of such contract or purchase, the right of way and other necessary lands may be acquired by the said company by condemnation according to the laws of Virginia relating to the acquisition of lands by internal improvement companies. And power is hereby given to the county courts of the counties of Norfolk, Nansemond and Isle of Wight to make such conditions, limitations and restrictions as they may deem proper to regulate the use of county roads in their respective counties by the said company. . . . It shall be lawful for

said company to transport passengers, freight and baggage over its lines of railway, and to collect fare and tolls for the same." Acts 1895-6, p. 912.

The Portsmouth Street Railway Company claims that the streets in question are county roads, and that, therefore, under its charter it has the right to occupy them subject only to such "conditions, limitations and restrictions" as may be imposed by the County Court of Norfolk county, and that the construction and operation of its railway will not impose any additional servitude upon said streets. Pursuant to such claims the company, after locating the Smithfield branch of its road through said streets, were proceeding with the construction of the same in Broad Street, when further work was prevented by the preliminary injunction awarded in this cause.

The Port Norfolk Land Company resists such contention, and claiming the reserved fee in such streets, refuses to consent to the construction of such street railway therein, alleging that such attempted occupation of the streets by the street railway company is a trespass; that its action is absolutely without authority of law, and that even if it were authorized by the charter, that such street railway would impose an additional servitude on such streets, and would be such a taking of private property as would entitle it to compensation; that such construction and operation of the street railway would constitute a public nuisance from which it would suffer a peculiar injury not shared in common with the general public, in that its lots on said streets would be greatly impaired in value.

The defendant has moved to dissolve the injunction. The questions involved have been argued exhaustively and at length, both orally and by briefs. I prepare this opinion at the request of counsel, but shall not undertake to refer to all of the interesting questions which have been raised or suggested.

First: It is earnestly argued by counsel for the street railway company that the streets in question are "county roads"; that being county roads, the legislature in section two of the charter gives it the right to occupy them. The argument is, that because the act under which they were dedicated creates "a public easement or right of passage" over such streets, and this easement is equivalent to the right which the public has in a county road, therefore these streets are county roads. It may be, and is, conceded that the dedication under the statute differs from a common law dedication in that no acceptance is necessary; that such dedication is irrevocable (except as provided in the act), and that by virtue of the dedication and force of the

statute the streets become public highways; and yet it does not follow as a necessary consequence that such highways are "county roads." However it may be elsewhere, it has long been settled in Virginia that county roads can only be established or accepted by the order of the county court. The county courts alone are authorized to establish county roads, and they are to see that they are kept in repair. *Kelly's Case*, 8 Gratt. 632; *Harris' Case*, 20 Gratt. 839; *Gaines v. Merryman*, 95 Va. 663.

Even in *Kelly's Case*, decided in 1851, Judge Leigh distinguishes between public roads and roads "laid off by the owner of the soil previous to a sale of the land in parcels and with the view of enhancing the sale."

It is not to be supposed, we think, that the legislature intended by the act under which these streets were dedicated, to change the long-established doctrine as to public county roads so as to permit any single private owner of land to lay it off into lots and streets for his own private advantage, and by that sole act of his to force upon the county court the care of such streets, and upon the tax-payers and the county treasury the expense of keeping them in repair. Yet if the argument is sound it leads to this result. In the absence of any manifestation in the statute that this was the intention of the legislature, we cannot adopt this construction of the act. The act itself negatives the idea that these streets are to be ordinary county roads, because it reserves to the dedicators—"where otherwise they have the right and power"—the right to "erect, put down and maintain gas, water and electric works, pipes, wires and fixtures" along or under such streets, which is utterly inconsistent with the idea that the dedication makes them ordinary county roads.

In ordinary county roads such acts as these could only be done by legislative authority. The fair construction of the act is that where such streets are located in a county, outside of an incorporated town or city (as Broad Street and Bay View Boulevard are) while they are irrevocably dedicated to the public for the use indicated by the statute, they do not become county roads until established as such or accepted by the county court. Until such establishment or acceptance the county court is not charged with their care, and the county treasury is not burdened with the expense of keeping them in repair. This care and burden imposed upon the county authorities distinguish county roads from all other thoroughfares. It follows, therefore, that I am of the opinion that the provision of the charter of the street

railway company authorizing it to occupy county roads is not sufficient to justify the occupation of the streets referred to.

Second: It is further argued for the street railway company that as the dedication creates "a public easement or right of passage" over these streets, the company has the right to occupy them because the charter gives it the right to build from Portsmouth to Smithfield; that it is practically impossible to build between these termini without occupying Broad Street and Bay View Boulevard, and that such use of these streets does not destroy the highway, is not inconsistent with the ordinary use of the highway, and does not impose any additional servitude upon the fee.

This raises a most interesting question, and while the authorities are numerous, such is the conflict between them, that its solution is most difficult.

Judge Dillon, in *Municipal Corporations*, concludes his remarks on the subject with this :

"Whoever shall read with attention the imperfect outlines here presented of the law concerning streets and cities, will be struck with the seeming uncertainty of the line which defines respective rights therein of the public and of the abutting owners; nor is this merely a seeming uncertainty; it is real and substantial."

The other text writers speak to the same effect. Cooley's *Constitutional Limitations*, 681; Redfield on *Railroads* 316, 329; Rorer on *Railroads*, 515.

Lewis on *Eminent Domain* says that "Decisions of different courts and even of the same courts at different times are conflicting and irreconcilable."

It may, however, be regarded as settled by the weight of authority that an ordinary commercial railroad, connecting widely different localities, transporting freight as well as passengers, is an additional servitude upon roads and streets. *Hodges v. Seaboard &c. R. Co.*, 88 Va. 653 (23 A. & E. Enc. L. 958); *Columbus &c. Co. v. Gardner*, 32 A. & E. R. Cas., note 254; *Adams v. Chicago &c. R. Co.*, 36 Do. 16; *Iron Mountain v. Bingham*, 38 Do. 452; 1 A. & E. R. Cas. (N. S.) 30.

It may be also regarded as settled that an ordinary local passenger street railway in a city or town is not an additional servitude on the streets, but only a new and improved mode of transportation. This doctrine is in some cases based upon the ground that in thickly populated communities the street railway lessens the congested condition of the street, facilitates travel on foot and in other vehicles, and thus

greatly relieves it of its natural burdens, by furnishing a most convenient, speedy and cheap method of transportation. The rule was first applied to local street railroads using horses as the motive power, and there was little dissent from it. Since then the same doctrine has been applied to local street railroads, whether the motive power was cable, steam or electricity. It may now be said that the motive power is immaterial. *Reid v. Norfolk &c. R. Co.*, 94 Va. 117; 4 Va. Law Reg. (May, 1898), 62; 23 A. & E. Ency. of Law, 954; *Rafferty v. Central &c. Co.*, 147 Pa. St. 579 (30 Am. St. 763); *Chicago &c. Co. v. St. Ry. Co.*, 139 Ind. 297 (47 Am. St. 264); 2 Dillon Munic. Corp., 4 ed., sec. 725 (576), note 3.

Since the rapid development of electricity as a motive power, and the extension of street car lines into suburban and country districts, connecting widely separated communities, the courts have found it more difficult to apply these doctrines to these new and modern conditions. To attempt to reconcile the conflicting decisions would be a vain task. Out of the confusion of tongues we must attempt to discover the true voice. Judge Cooley says: "Perhaps the true distinction is not to be found in the motive power of the railway, or in the question whether the fee-simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or, on the other hand, is a mere local convenience. When land is taken or dedicated for a town street it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and wants." Const. Lim. (6th ed.) 683. In *Carli v. Stillwater &c. Co.*, 28 Minn. 373 (3 A. & E. R. Cases 226) it is held that transferring freight cars through the street by animal power from the terminus of one railroad to that of another is the imposition of an additional servitude upon the street so as to entitle the owner of the servient estate to compensation.

In *Chicago &c. R. Co. v. Milwaukee &c. R. Co.*, 95 Wis. 561 (37 L. R. A. 856), it is held that an electric railway in a village street, which forms part of a line between South Milwaukee and Kenosha, running through three counties, connecting intermediate towns, for transporting merchandise, personal baggage, mail and express matter as well as passengers, constitutes an additional servitude or burden upon the lands of abutting owners, for which they are entitled to compensation. There is a line of cases which draw a distinction between country highways and city or town streets, holding that street rail-

roads do impose an additional burden upon country roads as being a new use of them different from that contemplated in the original dedication. *Pennsylvania R. Co. v. Montgomery &c. Co.*, 167 Pa. St. 62 (31 Atl. 468); *Zehran v. Milwaukee &c. Co.*, 74 N. W. (Wis.) 538; *Jaynes v. Omaha &c. Co.*, 74 N. W. (Neb.) 67; *contra*, *Canastota Knife Co. v. Newington &c. Co.*, 69 Conn. 146; *Paquet v. Mt. Tabor &c. Co.*, 18 Ore. 233; *Hiss v. Baltimore &c. Co.*, 52 Md. 242.

This distinction does not seem to be based upon sound reason. The highways outside of incorporated towns and cities should be subjected to the same burdens as the streets in such towns and cities, provided substantially the same conditions as to population and business exist. If the local public convenience is promoted by a street railway in the country, such use of the highway is as proper there as it is in the city. Inasmuch, however, as Broad Street and Bay View Boulevard were dedicated for use as streets, and not as country roads, under an act which contemplates the establishment of towns and cities and additions to the same, the distinction referred to has no application here. The rules applicable to town and city streets apply to the Port Norfolk streets.

"Unquestionably the distinctive and essential feature of a street railway, considered in relation to other railways, is that it is a railway for the transportation of passengers only" (Elliott, *Roads & S.* 557, *et seq.*; Booth, *St. Ry.*, sec. 2), the distinguishing difference between railroads for general traffic and street railways being in their use; not in their motive power. *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556 (43 Am. & Eng. R. Cas. 215); *Nichols v. Ann Arbor and Ypsilanti St. Ry. Co.*, 87 Mich. 361 (50 Am. & Eng. R. Cas. 150).

It follows, therefore, that there can be no departure by a street railway company from this exclusive service without a loss of its distinctive character as an urban passenger carrier, and the consequent loss of the particular privileges which are granted it as such, and the imposition of the graver obligations which the law places upon a general commercial railroad. Note, 1 Am. & Eng. R. Cas. (N. S.) 104.

The true test, therefore, is believed to be the use to which the road is to be put. The distinguishing characteristic of the street railway is that it is a local convenience, running upon the street, carrying passengers short distances, relieving the street from crowds of foot passengers and lessening the number of other carriages. It is held not to be an additional burden, because the passengers who use the cars would naturally travel the same streets either on foot or in some other vehicles if they did not use the cars.

On the other hand, the commercial railroad is not a mere local convenience, does not confine its route to roads and streets, connects distant localities, runs long trains carrying freight and passengers, and if using roads and streets in its route, is carrying freight and passengers over such highways that otherwise would not be carried over them, and is thus greatly adding to the burdens of the streets by subjecting them to greatly increased traffic and business, which but for the railroad would never use such thoroughfares.

Applying these views to the case at bar, it appears that the Portsmouth Street Railway Company proposes to use Broad Street and Bay View Boulevard—streets which were dedicated for such ordinary uses as might have been reasonably expected—for a part of its line of railroad more than twenty miles in length, extending from Portsmouth to Smithfield, through Norfolk, Nansemond and Isle of Wight counties, for the transportation of freight, passengers and baggage. It seems plain to me that such a road is to be classed as a commercial railroad, and not as a street railroad; that its purpose is to divert travel and freight through these streets, which would not otherwise come over them; that by the great weight of authority, and upon sound and well approved principles of law, it must be held that the construction and operation of its road would impose an additional servitude upon the streets, for which the owner of the fee is entitled to compensation.

It follows that the motion to dissolve the injunction will be overruled.